(3)

Supreme Court, U.S.
FILED
JAN 11 2002
CLERK

NO. 01-746

IN THE
SUPREME COURT OF THE UNITED STATES

BENJAMIN A. RATNER AND BETH HANEY,
Petitioners,

v.

LOUDOUN COUNTY PUBLIC SCHOOLS,
EDGAR B. HATRICK, HARRY E. BIBB,
JOSEPH L. MAUCK, AND ROBERTA GRIFFITH,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Steven H. Aden
(Counsel of Record)
John W. Whitehead
THE RUTHERFORD INSTITUTE
P.O. Box 7482
Charlottesville, VA 22906-7482
Telephone: (434) 978-3888

Counsel for Petitioners

January 11, 2002

14 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED ii

I. PETITIONERS PLED THEIR SUBSTANTIVE DUE PROCESS CLAIM AND ARGUED AND PRESERVED THE CLAIM IN THE COURTS BELOW. 1

II. LACKING GUIDANCE FROM THE SUPREME COURT, THE CIRCUIT COURTS OF APPEALS ARE IN DISAGREEMENT OVER WHETHER THE STANDARD *OF MATHEWS V. ELDRIDGE* APPLIES TO LONG-TERM SUSPENSIONS OR THE MORE LENIENT STANDARD *OF GOSS V. LOPEZ* 5

CONCLUSION 9

TABLE OF AUTHORITIES CITED

CASE AUTHORITY

Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) 4

Brenna v. Southern Colorado State College, 589 F.2d 475 (10th Cir. 1978) 4

Conley v. Gibson, 355 U.S. 41 (1957) 3

Dent v. West Virginia, 129 U.S. 114 (1889) 4

Dixon v. Alabama State Board of Educ., 294 F.2d 150 (5th Cir. 1961) 7, 8

Dunn v. Fairfield Comm. High School Dist. No. 225, 158 F.3d 962 (7th Cir. 1998) 4

Dusenbery v. United States, Sup.Ct. No. 00-6567 (January 8, 2002) 8

Gorman v. Univ. of Rhode Island, 837 F.2d 7 (1st Cir. 1988) 7

Goss v. Lopez, 419 U.S. 565 (1975) ..... *passim*

Grannis v. Ordean, 234 U.S. 385 (1914) 8

Hishon v. King & Spaulding, 467 U.S. 71 (1984) 3

Jeffries v. Turkey Run Consolidated School Dist.,

492 F.2d 1 (7th Cir. 1974) 5

Leatherman v. Tarrant County Narcotics Intelligence, 507 U.S. 163 (1993) 3

Mathews v. Eldridge, 424 U.S. 319 (1976) ..... *passim*

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 8

Nash v. Auburn Univ., 812 F.2d 655 (11th Cir. 1987) ... 4, 8

Newman v. Commonwealth, 884 F.2d 19 (1st Cir. 1989) ... 4

Newsome v. Batavia Local School Dist., 842 F.2d 920 (6th Cir. 1988) 6

Palmer v. Merluzzi, 868 F.2d 90 (3rd Cir. 1989) 7

Paredes v. Curtis, 864 F.2d 426 (6th Cir. 1988) 6

Ratner v. Loudon County Public Schools, et al., No. 00-2157 (July 30, 2001) 1

Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1st Cir. 1982) 7

Sameric Corp. v. City of Philadelphia, 142 F.3d 582 (3rd Cir. 1998) 5

Scheuer v. Rhodes, 416 U.S. 232 (1974) 3

Seal v. Morgan, 229 F.3d 567 (2000) 5

Univ. of Michigan v. Ewing, 474 U.S. 214 (1985) 7

Univ. v. Missouri v. Horowitz, 435 U.S. 78 (1978) 7

Wolff v. McDonnell, 418 U.S. 539 (1974) 4

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT

42 U.S.C. § 1983 3

FEDERAL RULES OF CIVIL PROCEDURE R. 12(b)(6) 1, 3

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Ben Ratner and Beth Haneyrespectfully submit their reply brief in support of their petition to this Honorable Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in *Ratner v. Loudoun County Public Schools, et al.*, No. 00-2157 (July 30, 2001). Petitioners seek review of the Court of Appeals' affirmance of the dismissal of their lawsuit for failure to state a claim pursuant to FEDERAL RULES OF CIVIL PROCEDURE R. 12(b)(6) based upon the lower courts' determination that no violation of the due process and equal protection guarantees of the Fourteenth Amendment occurs when a public school student is denied his state-created right to public education pursuant to an arbitrary and capricious "Zero Tolerance" disciplinary policy.

I. PETITIONERS PLED THEIR SUBSTANTIVE DUE PROCESS CLAIM AND ARGUED AND PRESERVED THE CLAIM IN THE COURTS BELOW.

Respondents allege that Petitioners failed to raise their claim of denial of substantive due process in the courts below. Brief in Opposition at 5. That is simply not so. The substantive due process claim was pled in Petitioners' complaint[1] and raised at

---

[1] *See* Petitioners' Complaint, filed June 8, 2000, Appx. to Petition at F1-F2, ¶¶ 1-2 (stating claims arising under the Fourteenth Amendment to the United States Constitution); F10, ¶¶ 44, 47-48

every level in the proceedings below. Petitioners' First Cause of Action alleged violations of the right to due process, and specifically recited:

> 44. Each of the suspensions constituted grossly excessive punishment that bore no rational relationship to, and was imposed without due consideration of the circumstances surrounding the alleged misconduct, and thus were arbitrary and capricious and imposed in violation of Mr. RATNER's right to due process.
>
> * * * *
>
> 47. State procedures are inadequate to protect students' rights of due process because suspensions are imposed pursuant to a "zero tolerance" policy that precludes consideration of the facts and circumstances of the particular student's conduct.
>
> 48. As a direct and proximate result of the wrongful conduct of the Defendants, all of which occurred under the color of state law, Mr. RATNER was deprived of his property right to a free, public education without due process of law, causing him to be impeded in his educational progress, to suffer injury to his reputation and mental well-being, to be ridiculed by the teachers and staff of LCPS, to be separated from his peers, and to incur unwarranted out-of-pocket expenses in meeting Mr. RATNER's educational needs.

Id. No more exacting articulation of the due process standard

---

(see text *infra*).

could reasonably be required of a civil claimant, particularly in view of this Court's admonition in *Leatherman v. Tarrant County Narcotics Intelligence*, 507 U.S. 163, 167-69 (1993), that notice pleading requirements "make no more demanding rule for pleading a complaint under [42 U.S.C.] § 1983 than for pleading other kinds of claims for relief."[2]

Petitioners' substantive due process claim was advanced in briefing in opposition to Defendants' FED. R. CIV. PROC. 12(b)(6) motion to dismiss as well,[3] a fact recognized by the District Court in its Memorandum Opinion. *Id.* at 5 ("plaintiffs contend that the suspensions constituted grossly excessive punishment that bore no rational relationship to and without due consideration of the circumstances"). While the substantive and procedural due process arguments were interspersed, Petitioners specifically argued that the policy was arbitrary and irrational on its face and as applied, and that Petitioner Ratner was deprived of his right to a public education in significant part because he refused to be coerced into professing trust in the school's ability to respond to his suicidal friend's needs. Memorandum in Opposition to Motion to Dismiss at 16 (citing

---

[2] [A]ll the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.... Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to define more narrowly the disputed facts and issues.

Conley v. Gibson, 355 U.S. 41, 47 (1957). *Accord Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Hishon v. King & Spaulding*, 467 U.S. 71, 73 (1984).

[3] *See* Memorandum in Opposition to Motion to Dismiss at 12-16.

several Fourteenth Amendment due process case authorities). Unfortunately, because the District Court summarily dismissed the Complaint without permitting oral argument, counsel for Petitioners had no opportunity to expand upon and discuss the claim before the court. The claim was renewed before the Fourth Circuit Court of Appeals.[4] That the District Court and the Fourth Circuit chose to address Petitioner's due process claims as if they arose principally under the procedural component of that clause is not the fault of Petitioners.

Petitioners' allegation that governmental actions that arbitrarily and capriciously deprived them of a state-created property interest in education gave rise to a right of redress under the substantive due process component of the Fourteenth Amendment is well-grounded in this Court's precedent, and in the case law of the Circuits. *See Newman v. Commonwealth*, 884 F.2d 19, 26 (1st Cir. 1989) (holding that right of teacher to be free from *arbitrary and capricious* nonrenewal of contract was sufficiently established to deprive defendant university officials of qualified immunity); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Dent v. West Virginia*, 129 U.S. 114, 123 (1889); *Nash v. Auburn Univ.*, 812 F.2d 655, 667 (11th Cir. 1987) ("Not only does the due process clause of the Fourteenth Amendment provide procedural protections, it provides a guarantee against *arbitrary decisions* that would impair appellants' constitutionally protectable interests"); *Dunn v. Fairfield Comm. High School Dist. No. 225*, 158 F.3d 962 (7th Cir. 1998) (policy under which students were suspended would violate substantive due process if it mandated "*wholly arbitrary*" results); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988); *Brenna v. Southern Colorado State College*, 589 F.2d 475,

---

[4] See Opening Brief at 14-15.

476-77 (10th Cir. 1978); *Jeffries v. Turkey Run Consolidated School Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974); *Seal v. Morgan*, 229 F.3d 567, 580 (6th Cir. 2000), and cases cited in Petition for Writ of Certiorari at 13-14. The District Court was obliged to take the allegations of Petitioners' Complaint as true, including the allegations that Respondents acted "arbitrarily" and "irrationally," which went to Respondents' state of mind and intent. "[T]he determination of whether the Board [of education's] action was rationally related to a legitimate state interest is one of law and would be made by the court. *The question of what the Board did, and why, would be questions of fact for the jury.*" *Seal v. Morgan*, 229 F.3d at 580, citing *Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 591 (3rd Cir. 1998). Consequently, the District Court committed clear error in dismissing the Complaint without permitting Petitioners an opportunity to have discovery on Respondents' irrational animus behind its policy and actions.

II. LACKING GUIDANCE FROM THE SUPREME COURT, THE CIRCUIT COURTS OF APPEALS ARE IN DISAGREEMENT OVER WHETHER THE STANDARD *OF MATHEWS V. ELDRIDGE* APPLIES TO LONG-TERM SUSPENSIONS OR THE MORE LENIENT STANDARD *OF GOSS V. LOPEZ.*

The Sixth Circuit Court of Appeals observed nearly fifteen years ago, in a case involving a procedural due process challenge

to an expulsion from a public high school:[5]

> We note as a general matter that, while the Supreme Court has addressed the issue of what process is due public school students in short suspension cases, *Goss v. Lopez*, the Court has specifically left open the question of what process is due in long-term suspensions (suspensions exceeding ten days) and expulsion cases. In the Court's words, "We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding ten days. Longer suspensions or expulsion for the remainder of the school term, or permanently, may require more formal procedures."

Newsome v. Batavia Local School Dist., 842 F.2d 920, 923 (6th Cir. 1988), quoting *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

"Without the aid of Supreme Court authority directly on point, we are left with resolving the procedural due process issues presented in this appeal under the more general rubric of *Mathews v. Eldridge* [424 U.S. 319 (1976)]," the court concluded. *Id.* The Sixth Circuit went on to analyze the one-semester expulsion of the plaintiff pursuant to the *Mathews* three-factor framework, 424 U.S. at 924. *See also Paredes v. Curtis*, 864 F.2d 426 (6th Cir. 1988) (declining to apply *Mathews* standard to 10-day suspension; "*Newsome* was an expulsion case and therefore would require more formal procedures").

---

[5] Although Respondent repeatedly characterizes the one-semester exclusion of Petitioner as a "suspension," it is more appropriately referred to as an "expulsion," as the *Newsome* court did. Whether it is labeled a "suspension" or an "expulsion" has no bearing on the due process standard to be applied, however.

Beyond implicit suggestions in two cases that student claimants should be afforded more process than the 10-day suspension addressed in *Goss* when claimants are deprived of educational opportunity for reasons other than academic performance, *see Univ. v. Missouri v. Horowitz*, 435 U.S. 78, 86 (1978); *Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court in the quarter-century since *Goss* still has not defined for the Circuit Courts and educators "what process is due" in such long-term suspension or expulsion cases. Lacking adequate direction, the Circuit Courts of Appeals have taken diverse approaches. Like the Sixth Circuit, the First Circuit applied the *Mathews* standard to a college student's semester suspension for abusive conduct, and in assessing the balance of interests noted, "The interests of students in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma are, of course, paramount." *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 14 (1st Cir. 1988); *cf. Rose v. Nashua Bd. of Educ.*, 679 F.2d 279, 282 (1st Cir. 1982). The Third Circuit, addressing a sixty-day athletic suspension of a talented high school football player, held that the *Goss* standard of "notice and an opportunity to be heard" was sufficient under the circumstances. *Palmer v. Merluzzi*, 868 F.2d 90, 95 (3rd Cir. 1989). The Fourth Circuit, in contrast to the panel's decision in Petitioner's case, previously held in a university expulsion case that *Mathews* supplied the correct procedural standards, and cited with approval the Fifth Circuit's decision in *Dixon v. Alabama State Board of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (reversing the dismissal of college students who protested segregation for lack of procedural safeguards, including access to witnesses and a report of the charges and the statements upon which they are based), which Petitioners urged to the court of appeals as the correct

articulation of the process due for a long-term suspension.[6] With Petitioner's case, the Fourth Circuit's position is now in doubt.[7]

The issue of which standard applies is critical in a case such as Petitioners', which alleges numerous procedural defects in the process afforded their appeal of a long-term suspension. These defects include failure at any time to provide a report of the facts giving rise to the suspension, Pet. at 7-8 (*cf. Dixon, supra*, at 159, requiring report of charge, witnesses and testimony); and failure to inform Petitioners of their right to appeal to the school board, and their right to appeal the school board's decision to the circuit court. *Id.* The latter failure resulted in the loss of Petitioners' right to appeal.

> "'The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 [1914]. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Dusenbery v. United States, Sup.Ct. No. 00-6567 (January 8, 2002) (Ginsburg, J., dissenting). By failing to find in *Goss* or *Mathews* a requirement that due process afford these basic protections of notice and a report of the charges in the case of a semester-long suspension, the Fourth Circuit underscored the lack

---

[6] Opening Brief at 16.

[7] The Eleventh Circuit has also acknowledged the *Dixon* standard with approval as precedent on that Court of Appeals. *Nash v. Auburn Univ.*, 812 F.2d 655, 660 (11th Cir. 1987).

of clarity among the Circuits regarding the scope of *Mathews'* application to long-term suspensions. That longstanding confusion warrants review by this Court.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that their petition be granted, and that certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the appeals court's decision affirming the dismissal of their lawsuit against Respondents.

Respectfully submitted,

John W. Whitehead
Steven H. Aden
(Counsel of Record)
THE RUTHERFORD INSTITUTE
P.O. Box 7482
Charlottesville, VA 22906-7482
Telephone: (434) 978-3888

January 11, 2002